



## **MEMO**

**To: Allegiance Companies' Clients**

**Date: June 25, 2010**

### **Additional analysis of the Interim Final Regulations for Grandfathered Plans**

This analysis is a follow-up to what was provided last week on the Interim Final Regulations on Grandfathered Health Plan Status under the Patient Protection and Affordable Care Act (PPACA):

#### **Guidance under the Interim Final Rules**

Earlier this month, the U.S. Departments of Labor, Treasury and Health and Human Services jointly released the Interim Final Rules for Group Health and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act (the Rule or IFR). A 60-day public comment period began on June 14, 2010, the date of publication.

These rules don't address at what point changes to a group health plan or health insurance coverage are significant enough to cause the plan or health insurance coverage to cease to be a grandfathered plan. This question may be addressed by further regulatory guidance.

This guidance is written to help plan sponsors understand what changes a plan can make to health insurance coverage or group health plans without losing grandfather status under PPACA. It also details the administrative requirements a plan must take to maintain that status.

Note: If plans find that the requirements to maintain grandfathered plan status create too much of a burden, not much is lost by failing to maintain that status because many of the major group market reforms cannot be avoided even with grandfather status.

### **Definition of a Grandfathered Plan**

A group health plan, either insured or self-funded, that was in existence on March 23, 2010, is a grandfathered plan under PPACA. Grandfathered plans are only subject to certain provisions of the Act, while being grandfathered allows the plan to not have to comply with some PPACA mandates. Family members, new hires and late enrollees added to or dropped from the plan will not negate a plan's grandfather status.

Any new policy, certificate or contract of insurance issued – not renewed – after March 23, 2010 is not grandfathered. Any insurance policy sold to new entities or individuals after March 23, 2010 is not grandfathered, even if the product was offered in the group or individual market before March 23, 2010.

### **Permissible Changes (No Loss of Grandfather Status)**

- Changes to the amount of premiums, as long as employee contributions don't increase by greater than 5%, as adjusted for medical inflation.
- Changing the plan's third party administrators, provided the change is made without impacting benefit design.
- Changes required to comply with federal or state law.
- Voluntary plan changes to comply with provisions of PPACA or to increase benefits.
- Changes made prior to March 23, 2010.
- Enrolling family members of an individual who was enrolled on March 23, 2010.
- Enrolling new employees or already existing employees who previously declined coverage and their families.
- Employees switching benefit options.

### **Impermissible Changes (Will Cause Loss of Grandfather Status)**

- Obtaining new policy or contract of insurance.
- Eliminating benefits for a particular condition, including the elimination of necessary element to diagnose or treat a condition. Example: A plan provides mental health benefits, which include both counseling and prescription drug benefits. The plan eliminates benefits for counseling, but not the prescription drug benefits. According to the IFR, the plan has eliminated an element of coverage that is necessary to treat a condition, i.e., mental health illness. Thus, the plan loses its grandfather status.
- Any increase in cost-sharing percentage requirements (e.g., coinsurance) above the level in effect on March 23, 2010.
- Increases in fixed-amount cost-sharing requirements above the level in effect on March 23, 2010, other than co-pays (e.g., deductible or out-of-pocket limits) by more than medical inflation plus 15%, as measured from March 23, 2010.
- Increases in co-pays above the level in effect on March 23, 2010, by an amount that exceeds the greater of: (a) the sum of medical inflation plus 15%, or (b) \$5 increased by medical inflation. (The IFR sets forth a complex formula and examples that illustrate how to apply this requirement.)
- Decreases, by an employer or employee organization, in its contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5% below the contribution rate on March 23, 2010.
- Imposing an annual limit on the dollar amount of all benefits if the plan on March 23, 2010 did not impose an overall annual or lifetime limit.
- Imposing an overall annual limit at a dollar value that is lower than the dollar value of the lifetime limit existing on March 23, 2010, for a plan that had an overall lifetime limit but no overall annual limit on March 23, 2010.

### **Administrative Requirements**

In order to maintain grandfather status, insurers and plans must maintain records documenting policy or plan terms

that were in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify its status as a grandfathered plan. These records must be made available upon request. The ability to inspect these documents is available to participants, beneficiaries, subscribers, or state or federal agencies to verify the plan's status as a grandfathered plan.

To maintain grandfather status, an insurer or plan must include a statement, in any plan materials provided to participants that describe benefits, that the insurer or plan "believes" that it is grandfathered under PPACA. The insurer or plan must provide contact information for questions and complaints. The plan administrator's contact information must be provided, along with contact information for the U.S. Department of Labor (in the case of an ERISA plan) or Health and Human Services (for individual or nonfederal government plans). The Rule provides model language that insurers and plans can use to satisfy this disclosure obligation.

#### **Further Guidance Not Yet Out (Will or Will Not Cause Loss of Status)**

- Changes to plan structure, i.e., moving from insured to self-funded coverage or switching a health reimbursement arrangement to major medical coverage?
- Changes to a provider network?
- Changes to a prescription drug formulary?
- Any other substantial change to the overall benefit design?

#### **Overall Application**

The grandfathered plan rules apply separately to each benefit package made available under a group health plan or health insurance coverage.

Health insurance coverage maintained pursuant to one or more collective bargaining agreements ratified prior to March 23, 2010, is considered grandfathered coverage until at least the date on which the last of the collective bargaining agreements terminates. The Preamble to the Rule clarifies that this special rule only applies to insured plans maintained pursuant to a collective bargaining agreement (not self-funded collectively bargained plans).

These are the transition rules for plans that already have made changes prior to the publication of the IFR:

- (a) Prior to March 23, 2010 - A plan won't lose grandfather status for changes that would otherwise cause loss of the status as long as the changes were adopted prior to March 23, 2010 (even if they take effect after March 23, 2010), and adopted pursuant to a legally binding contract, insurance filing, or written plan amendment.
- (b) Good Faith Compliance - For plan changes adopted after March 23, 2010, but before issuance of the Rule, which "only modestly exceed" the parameters established by the Rule, the federal agencies will "take into account good-faith efforts to comply with a reasonable interpretation of [PPACA]" in deciding whether such changes have caused the policy or plan to lose grandfather status.
- (c) Grace Period - For more significant changes to a policy or plan adopted after March 23, 2010 but before the Rule's issuance, the insurer or plan may revoke such change prior to the beginning of a plan year commencing on or after September 23, 2010. If changes aren't revoked or modified, the plan loses its grandfather status.

The Preamble to the Rule clarifies that retiree-only plans and HIPAA excepted benefits are not subject to the insurance market reforms of PPACA. Excepted benefits under HIPAA generally include benefits specifically listed under HIPAA (e.g., accident and disability, separate limited scope dental and vision plans, supplemental coverage, independent disease-only coverage and fixed indemnity plans).

A plan can add new employees, whether newly hired or newly enrolled, after March 23, 2010, without loss of grandfather status. Employees may move between benefit options at annual enrollment without affecting the grandfather status of either option. Plans may transfer employees from one plan to another plan without impacting grandfather status, as long as there is a bona fide employment-based reason for the transfer. (The Rule provides that changing the terms or cost of coverage is not a bona fide employment-based reason). With respect to mergers and acquisitions, the Rule states that if the "principal purpose" of a merger, acquisition, or restructuring is to cover new individuals under a grandfathered plan, the plan will lose its grandfather status.

Plan sponsors can decide to take any of the following actions regarding grandfathered plan coverage:

- Continue offering the same plan or coverage in effect on March 23, 2010 – and keep the grandfather status.
- Significantly change the terms of the plan or coverage and comply with PPACA provisions from which grandfathered plans are excepted – and lose the grandfather status.

We hope this guidance is useful. The complete interim final regulations can be viewed at <http://www.dol.gov/ebsa/healthreform/>.

We hope you find this information helpful in guiding your compliance with health care reform.

**Thank you!**